

Call for Evidence

Brexit: Enforcement and dispute resolution – Is there a role for the Court of Justice of the European Union?

The EU Justice Sub-Committee, under the Chairmanship of Baroness Kennedy of The Shaws, has launched a new inquiry on the question of enforcement and dispute resolution post-Brexit.

The Government has said that leaving the European Union will “bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU).” This raises questions about the options for enforcement and dispute resolution mechanisms for UK-EU agreements; and, how EU law will be interpreted in the UK post-Brexit.

This issue encompasses two distinct components:

- the domestic legal context, where the Government is seeking to make provision about EU law via the *EU (Withdrawal) Bill*. It will also have to enact into domestic legislation the relevant provisions contained in any Withdrawal Agreement with the EU;
- the EU context, where the Government will need to negotiate a new international legal relationship with the EU 27. This raises the question as to whether there is still a role for the CJEU, or another pan-European Court (such as the EFTA Court¹), or if some other international dispute resolution procedure is more appropriate.

The Government published a ‘Future Partnership Paper’ on the question of enforcement and dispute resolution in August 2017.² It set out a number of options on how “both the provisions of the Withdrawal Agreement, and our new deep and special partnership, can be monitored and implemented to the satisfaction of both sides, and how any disputes which arise can be resolved.” Methods discussed by the Government included:

- A Joint Committee comprised of representatives from both parties where dispute resolution might be governed either by “governmental or diplomatic dialogue” or by some “additional binding mechanisms”;
- Arbitration models (which are common in international agreements focused on trade and economic cooperation);
- Reporting and monitoring requirements (such as those contained in the Schengen agreement which are designed to ensure uniform interpretation and application of case-law);
- Potential reference to future CJEU case-law (for example as occurs between the CJEU and the EFTA Court³).

¹ The EFTA States are Norway, Iceland, Switzerland and Liechtenstein, but the EFTA Court’s jurisdiction does not extend to Switzerland as it is not a member of the EEA.

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf

³ Article 3 of the Surveillance and Court Agreement provides that the EFTA Court should ‘pay due account’ to relevant CJEU decisions that arise after the signing of the EEA agreement.

The option that the Government chooses will have a significant impact on UK law: for example it will affect whether individual citizens and businesses will be able to have their cases referred to an international court or tribunal post-Brexit.

The Committee has already held a preliminary scoping evidence session with four senior retired judges: Rt Hon the Lord Hope of Craighead, Convenor of the Crossbench Peers and Former Deputy President of the Supreme Court of the United Kingdom; Rt Hon the Lord Neuberger of Abbotsbury, Former President of the Supreme Court of the United Kingdom; Rt Hon the Lord Thomas of Cwmgiedd, Former Lord Chief Justice of England and Wales; and Rt Hon Sir Konrad Schiemann, Former judge at the Court of Justice of the European Union.⁴

The Committee is now issuing a formal call for evidence on this important matter. Issues under consideration include:

- Whether there could be a role for the CJEU in the UK post-Brexit.
- The most appropriate method of enforcement and dispute resolution in respect of the Withdrawal Agreement and subsequent partnership arrangements with the EU.
- How the Government can deal with questions relating to EU law in the domestic courts post-Brexit and during any period of transition (including the potential for divergence between UK law and EU law).
- Whether anything can be learned from the EFTA Court model, or other alternative models for dispute resolution.
- The impact Brexit will have on the UK's ability to influence the development of the law in other jurisdictions including the EU and the United States.
- If UK citizens should have a direct right of access to any new enforcement or dispute resolution procedures (or whether there should be a reference procedure, as currently exists with the CJEU).
- The potential impact of excluding the jurisdiction of the CJEU, both on UK domestic law and on securing a workable Withdrawal Agreement and any transitional arrangements under Article 50.

Baroness Kennedy said:

“The evidence that we received from four of the UK’s most senior former judges highlighted the dangers of legal uncertainty post Brexit.

It was apparent that the judges had significant concerns about the operation of ‘retained EU law’ in the UK under Clause 6 of the *European Union (Withdrawal) Bill*.⁵ The former Lord Chief Justice, Lord Thomas of Cwmgiedd, warned that there could be a ‘very real problem for future judicial independence and the rule of law if this is not clarified.’ In addition to concerns about the wide discretion that might be given to the judiciary to take what might be seen as ‘political’ decisions, it is also far from clear that the provisions relating to the interpretation of retained

⁴ A transcript of the session, which was held on 21 November 2017, is available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-the-jurisdiction-of-the-cjeu/oral/74225.html>

⁵ Note for editors: Clause 6 of the *European Union (Withdrawal) Bill* sets out how retained EU law is to be read and interpreted on and after exit day. The judges’ concerns are set out in full at Q9 of the transcript of the evidence session.

EU law under Clause 6 of the Bill allow for a smooth transition. The Bill was clearly not drafted with a transitional period in mind. It would preclude references to the Court of Justice of the European Union, and not require UK domestic courts to take account of post-Brexit EU law, despite the fact that the UK may continue to be effectively bound by EU law during the transitional period.

Going forward, the Government will have to ensure that it can agree a clear, certain and robust enforcement mechanism to ensure that any rights and obligations under the Withdrawal Agreement (and subsequent partnership arrangements with the EU) can be upheld in the event of a dispute. The Committee is seeking expert evidence on the most appropriate way of ensuring that dispute resolution procedures post-Brexit can be dealt with efficiently and effectively.”

The Committee asks for written submissions to be received by Friday 19 January.

ANNEX: GUIDANCE FOR SUBMISSIONS

Written evidence should be submitted online using the written submission form available at [. http://www.parliament.uk/brexit-enforcement-dispute-resolution-submission-form/](http://www.parliament.uk/brexit-enforcement-dispute-resolution-submission-form/) This page also provides guidance on submitting evidence. The deadline for written evidence is Friday 19 January 2018.

Short submissions are preferred. A submission longer than six pages should include a one-page summary. Paragraphs should be numbered. All submissions made through the written submission form will be acknowledged automatically by email.

Evidence that is accepted by the Committee might be published online at any stage; when it is so published it becomes subject to parliamentary copyright and is protected by parliamentary privilege. Submissions that previously have been published will not be accepted as evidence. Once you have received acknowledgement that the evidence has been accepted you will receive a further email, and at this point you may publicise or publish your evidence yourself. In doing so you must indicate that it was prepared for the Committee, and you should be aware that your publication or re-publication of your evidence might not be protected by parliamentary privilege.

Personal contact details will be removed from evidence before publication, but will be retained by the Committee Office and used for specific purposes relating to the Committee's work, for instance to seek additional information.

Persons who submit written evidence, and others, may be invited to give oral evidence. Oral evidence is usually given in public at Westminster and broadcast online; transcripts are also taken and published online. Persons invited to give oral evidence will be notified separately of the procedure to be followed and the topics likely to be discussed.

Substantive communications to the Committee about the inquiry should be addressed through the clerk of the Committee, whether or not they are intended to constitute formal evidence to the Committee.

This is a public call for evidence. Please bring it to the attention of other groups and individuals who might not have received a copy direct.

You may follow the progress of the inquiry at <http://www.parliament.uk/brexit-enforcement-dispute-resolution/>